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No. 71-998

In the Supreme Court of the United States

OCTOBER TERM, 1971

GUIDO ANTHONY PENOSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 452 F. 2d 217.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. B1) was entered on December 8, 1971; and a petition for rehearing was denied on January 7, 1972 (Pet. App. B, p. B2). The petition for a writ of

certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sufficient evidence supports petitioner's conviction of willfully attempting to evade or defeat his income taxes.

2. Whether the trial judge erred in refusing to give certain jury instructions.

STATUTES INVOLVED

Sections 7201 and 7203 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 2-3.

STATEMENT

Petitioner was charged and convicted under an eight-count indictment of failing to file income tax returns and of attempting to evade and defeat his income taxes for each of the years 1964 through 1967, in violation of 26 U.S.C. 7201 and 7203, and was sentenced to concurrent prison terms, the longest of which was forty-five months. The court of appeals affirmed (Pet. App. A).

The pertinent facts are not disputed and are set forth fully in the court of appeals' comprehensive opinion (Pet. App. A, pp. A1-A3). The government used the "expenditures less funds available" method of proof to show that in the years in question petitioner, though he did not file any tax returns, had

taxable income and unpaid taxes as follows (Pet. App. A, p. A2):

Year	Taxable Income	Tax Due
1964	$ 7,853.70	$1,450.74
1965	11,313.81	2,109.04
1966	17,096.70	3,567.08
1967	18,382.63	2,562.95

An Internal Revenue Agent testified, in support of the government's assertion that petitioner's income came from taxable sources, that he had conducted a careful investigation covering financial institutions, courts of record, relatives and friends both in the Miami Beach, Florida, area, where petitioner then resided, and in New York City where petitioner had lived previously (R. 91, 97-98; 209-223).[1] This investigation indicated that on December 31, 1963, petitioner had no sizable assets or other non-taxable sources of income (R. 119, 209-223). During the four years in question (1964-1967), however, petitioner's expenditures, in the form of currency and money orders, exceeded $76,000 (R. 220, 235). The agent indicated that neither petitioner nor his relatives and associates gave him any explanation concerning the source of the funds that petitioner spent or the nature of his livelihood (R. 91, 97-98, 209-223).

At trial petitioner presented no evidence. Instead, he argued that the prosecution had failed to meet its burden of demonstrating that the expenditures

[1] "R." references are to the separately bound record appendix filed in the court of appeals.

came from taxable income. The jury disagreed and returned a guilty verdict on each count. (Pet. App. A, p. A3.)

As regards the government's method of proof, the district judge instructed the jury that "the Government must further prove beyond a reasonable doubt that the defendant had no accumulation of funds at the beginning of the taxable year from which to secure and pay out such sums," and that the jury should infer nothing from the expenditures shown "unless and until the Government has proven, if it did prove, beyond a reasonable doubt that the expenditures made were made out of taxable income and not from prior income, accumulations, gifts or loans, or sources which were nontaxable income" (R. 320, 321.) Petitioner requested different instructions, and objected both before and after the jury charge to the judge's refusal to use his instructions (R. 326).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or other ground for further review.

1. Petitioner claims (Pet. 9) that "there was no proof adduced by the government of any affirmative positive acts on the part of petitioner to attempt to defeat or evade the tax," and that accordingly his conviction of the felony charges under 26 U.S.C. 7201 is not supported by sufficient evidence under the teaching of *Spies* v. *United States*, 317 U.S. 492. As the Court pointed out in *Spies*, however, an "affirma-

tive willful attempt may be inferred from conduct such as * * * covering up sources of income, [and] handling of one's affairs to avoid making the records usual in transactions of the kind * * *" (317 U.S. at 499). The circumstances of the present case fit this category. Petitioner not only failed to file any tax returns but also would not disclose to the agent the sources of the funds he spent. He arranged his financial affairs so that there were no books, records, checks, bank accounts or credit cards, dealt in cash for the most part (R. 219-222), and even used a name other than his own in signing an apartment lease (R. 175-176).

This case is quite different from *United States* v. *Mesheski*, 286 F. 2d 345 (C.A. 7), which petitioner characterizes as "squarely in conflict" with the decision below (Pet. 10). The court in *Mesheski*, on the particular facts there, found that the government had not shown sufficient affirmative conduct by the taxpayer. The government's proof in this case, as detailed above, was substantially stronger.

There was also ample evidence from which the jury could infer that the funds petitioner spent came from taxable sources. The "expenditures less funds available" method of proof has been judicially approved (*Holland* v. *United States*, 348 U.S. 121; *Tagliaretti* v. *United States*, 398 F. 2d 558 (C.A. 1), affirmed *per curiam*, 394 U.S. 316), and can be used to establish current income where, as in this case, it is shown (R. 209-233) that there were no prior accumulations or other nontaxable sources from which

the funds spent likely would have come.[2] See *United States* v. *Massei*, 355 U.S. 595. As the court below noted, petitioner's interpretation of and reliance on *Marcus* v. *United States*, 422 F. 2d 752 (C.A. 5), is mistaken, since here, unlike the situation in *Marcus*, the government's proof negated prior accumulations or nontaxable sources (Pet. App. A, pp. A3-A6).

2. The instructions to the jury embraced all the elements of the expenditures method of proof. The jury was repeatedly told that the government must show that the expenditures came from taxable rather than nontaxable sources, and illustrations of nontaxable sources (such as gifts, inheritances, and the like) were listed (R. 317, 321). The instructions also stated that "the Government must further prove beyond a reasonable doubt that the defendant had no accumulation of funds at the beginning of the taxable year from which to secure and pay out such sums" (R. 320). The trial judge admonished that nothing should be inferred from the expenditures shown "unless and until the Government has proven, if it did prove, beyond a reasonable doubt that the expenditures made were made out of taxable income and not from prior income, accumulations, gifts or loans, or sources which were nontaxable income" (R. 321).

Petitioner did not object to the instructions as given before the jury began deliberations, and thus waived

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[2] The government's computation credited petitioner with nontaxable items, such as Blue Cross refunds and automobile resale proceeds (R. 236).

the claims which he seeks now to raise. See Rule 30, Fed. R. Crim. P.; 2 Wright, *Federal Practice and Procedure*, Sec. 484; see also *Thompson* v. *United States*, 272 F. 2d 919, 922 (C.A. 5). In any event, the trial judge properly declined to give petitioner's requested instructions (Pet. 6-8). Those instructions were in fact used so far as they correctly stated the facts and the law applicable to the present case and as modified to reflect that the government was using an expenditures, rather than a net worth, method of proof.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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